In the Supreme Court of the United States

October Term, 1977
No. 77-1288

Supreme Court, U. S.
FILED
JUN 2 1978
MICHAEL RODAK, JR., CLERK

JOHN PHILIP QUAGLINO,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

No. 77-1288

RESPONDENT'S OPPOSING BRIEF ON PETITION FOR WRIT OF CERTIORARI

EVELLE J. YOUNGER, Attorney General
of the State of California
JACK R. WINKLER, Chief Assistant
Attorney General, Criminal Division
S. CLARK MOORE,
Assistant Attorney General
NORMAN H. SOKOLOW,
Deputy Attorney General
ANDREW D. AMERSON,
Deputy Attorney General

800 Tishman Building
3580 Wilshire Boulevard
Los Angeles, California 90010
Telephone: (213) 736-2200
Attorneys for Respondent

Westside Law Publishers Santa Monica, California (213) 451-1714

TOPICAL INDEX

Page

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Statement of the Case 3

Argument 7

I Where Petitioner Never Clearly Objected To The Use Of Hypnosis As A Tool To Heighten Recollection Of Witnesses, And Where, For That Reason, The Intermediate Appellate State Court To Which Certiorari Is Sought, Never Passed Upon The Issue And The Issue Was Not Considered On The Merits By The Highest State Court And Further, Where The Issue Involves A Question Of State Evidentiary Law And No Federal Question, It Is Inappropriate To Grant The Petition For Writ Of Certiorari 7

II Petitioner Received Effective Representation Of Counsel From His Trial Defense Counsel At Trial Despite The Fact That Trial Defense Counsel Did Not Object To The Identification Evidence On The Ground That The Identification Was Made After The Witness Had Seen A Psychiatrist Who Had Sought To Assist His Recall Through Hypnosis 10

Conclusion 13

TABLE OF AUTHORITIES

Cases — **Page**

Beasley v. United States (6th Cir. 1974) 491 F.2d 687 11

Beck v. Washington (1962) 369 U.S.541 9

Brubaker v. Dickson (9th Cir. 1962) 310 F.2d 30 11

California v. Green (1970) 399 U.S. 149 10

Cardinale v. Louisiana (1969) 394 U.S. 437 9

Fuller v. Oregon (1974) 417 U.S. 40 9

Harding v. State (Md. App. 1968) 246 A.2d 302 8

Hill v. California (1971) 401 U.S. 797 9

Kline v. Ford Motor Co. Inc. (9th Cir 1975) 523 F.2d 1067 8

Labine v. Vincent (1971) 401 U.S. 532 10

McMann v. Richardson (1970) 397 U.S. 759 11

Moore v. United States (3d Cir. 1970) 432 F.2d 730 11

People v. Boothe (1977) 65 Cal.App.3d 685, 135 Cal.Rptr. 570 8

People v. Cook (1975) 13 Cal.3d 663, 119 Cal.Rptr. 500, 532 P.2d 148 10

People v. DeSantiago (1969) 71 Cal.2d 18, 76 Cal.Rptr. 809, 453 P.2d 353 8

People v. Mabry (1969) 71 Cal.2d 430, 78 Cal.Rptr. 655, 455 P.2d 759 8

People v. Martinez (1975) 14 Cal.3d 533, 121 Cal.Rptr. 611, 535 P.2d 739 11

People v. Modesto (1963) 59 Cal.2d 722, 31 Cal.Rptr. 225, 382 P.2d 33 8

People v. Morse (1964) 60 Cal.2d 631, 36 Cal.Rptr. 201, 388 P.2d 33 8

People v. Welch (1972) 8 Cal.3d 106, 104 Cal.Rptr. 217, 501 P.2d 225 8

People v. Young (1970) 9 Cal.App.3d 106, 87 Cal.Rptr. 767 8

State v. Jorgensen (Ore. App. 1971) 492 P.2d 312 8

Stembridge v. Georgia (1952) 343 U.S. 541 9

Street v. New York (1969) 394 U.S. 576 9

United States v. Elksnis (9th Cir. 1975) 528 F.2d 236 11

United States v. Stern (9th Cir. 1975) 519 F.2d 521 11

Wyller v. Fairchild Hiller Corporation (9th Cir. 1974) 503 F.2d 506 8

Statutes

28 U.S.C. § 1257(3) 9

Books

Stern and Gressman, *Supreme Court Practice*, § 3.27 at p. 120 (4th ed. 1969) 9

In the Supreme Court of the United States

October Term, 1977
No. 77-1288

JOHN PHILIP QUAGLINO,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

RESPONDENT'S OPPOSING BRIEF ON PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

On September 30, 1977, a panel of three justices of the Court of Appeal of the State of California, Second Appellate District, Division Three, rendered an opinion affirming petitioner's conviction in the Superior Court of

the State of California for the County of Santa Barbara, for murder in the first degree in violation of California Penal Code section 187 in case 2d. Crim. No. 29766. The opinion was ordered unpublished. A copy of this opinion is attached to the petition filed with this Honorable Court as Appendix A.

Thereafter, petitioner petitioned unsuccessfully for rehearing in the Court of Appeal of the State of California. On December 15, 1977, the Supreme Court of the State of California denied his petition for hearing without opinion.

JURISDICTION

The grounds for jurisdiction of this Court urged by petitioner appear in the petition, page 2.

QUESTIONS PRESENTED

1. Should a petition for writ of certiorari be granted to consider the propriety of the admission of identification evidence in a state trial court where petitioner never raised a proper objection at or before trial as to the acceptance by the scientific community of hypnosis as a reliable technique for enhancing recollection of a witness for the purpose of identifying the suspect and where the intermediate appellate court to which certiorari is sought, accordingly, did not consider the issue on appeal, and further, where the evidence at issue does not involve a federal question?

2. Must an attorney's representation be regarded as constitutionally ineffective as a matter of law where the attorney failed to make an evidentiary objection at trial as to the reliability of an identification where trial defense counsel had successfully represented appellant through two prior trials of the same cause terminated by hung

juries, and where the three psychiatrists who testified concerning hypnosis, including two defense psychiatrists, agreed that hypnosis was one of the tools available to psychiatrists for attempting to improve memory recall?

STATEMENT OF THE CASE

The facts relating to the murder and appellant's subsequent identification as purchaser of the automobile used as the murder weapon are as set out in the opinion of the Court of Appeal (Appendix A to the Petition, pages 2-5, 6), as follows:

At approximately 6:30 a.m. on the morning of September 10, 1975, Dyanne Quaglino, the estranged wife of appellant,[1] was struck by a car and killed as she was jogging. The car did not stop and there were no automobile skid marks in the area where her body was found, which was unusual for this type of accident. Based on the description of a witness who had seen the car drive up the street but who had not seen the accident, the police located the car, a 1959 green and white Ford, that evening behind the apartment complex where appellant lived. Tire tracks and glass found at the scene of the accident matched up with this car. Additionally, fibers from Dyanne's clothing were found on the car's exterior.

In May 1975, Myron Jensen, who worked at a Chevrolet dealership, sold the car for a friend to a Richard W. Bellmore. Jensen kept the car at this house and did not sell the car through the dealership. After agreeing to buy the car and arranging to pick it up later, the purchaser drove

---

[1]Dyanne had filed for divorce approximately five months before her death. [Notes 1 through 4 in this opposition appear in the opinion of the Court of Appeal of the State of California as notes 3 through 6.]

away in a 1970 brown Chevrolet station wagon.[2] Several days later the purchaser came to Jensen's place of employment and told him that the battery did not work. Jensen replaced the battery for him and gave him the smog certificates for the car.

The Santa Barbara County Sheriff's Department contacted Jensen on September 11 and asked him to describe the purchaser of the car. The deputies then showed him a 12 year old picture of appellant and asked him if he looked familiar. Jensen stated that the picture "struck a bell," but could not identify it. The following weekend the deputies showed Jensen seven pictures of bearded men, none of whom he could identify as the purchaser.[3]

The following week, the deputies and Dr. Frank Gott, a Santa Barbara psychiatrist, contacted Jensen about undergoing hypnosis to improve his memory of the person who had purchased the car. Jensen agreed and Dr. Gott hypnotized him. After Jensen came out of hypnosis, he was given a stack of seven photographs. He picked out appellant's picture as the man to whom he sold the car. At a lineup at the county jail a few days later, Jensen again identified appellant.

A handwriting expert testified at the trial that it was highly probable that the person who had written "Richard W. Bellmore" on the transfer document was appellant. Since appellant refused to give a handwriting exemplar of

---

[2]The defense introduced evidence that appellant did not own nor have access to a car matching this description.

---

[3]These pictures include the picture of Richard A. Bellmore, an out-of-state resident who was then a suspect in the case. Bellmore happened to be the last name of a male clubmate of appellant at business school.

the specific words, the expert could not give a more positive opinion.

A fingerprint expert testified that numerous prints were removed from the car and he formed the opinion that one of the fingerprints was appellant's. Two defense fingerprint experts, however, testified that although there were similarities between the prints, they could not positively identify the fingerprints as those of appellant.

The prosecution also produced evidence that Dyanne and appellant were separated, were involved in divorce proceedings, and had had disagreements over the property settlement and child custody. Several witnesses also testified that on several occasions, appellant had threatened to hurt Dyanne. One witness testified that appellant told him that Dyanne was an unfit mother and he was going to get the children back one way or another. Appellant also told one of Dyanne's friends that he was sorry he beat her.

Appellant testified in his own behalf. He denied that he had killed his wife. He stated that he was in bed with his girlfriend, Sonia Gowda, on the morning of Dyanne's death. He got up to jog around 6:00 a.m. on the morning of Dyanne's death and returned approximately 20 minutes later.[4] At 7:15 a.m. the sheriff's office called and told appellant to come over to the house of one of Dyanne's neighbors. He was then told that Dyanne had been killed by a hit-and-run accident. Appellant stated that he had never purchased nor seen the 1959 Ford which caused Dyanne's death.

---

[4]Sonia Gowda's testimony was read into evidence by the prosecution and the defense introduced her picture. She testified that appellant went out jogging the morning of his wife's death, but had not been breathing heavy when he returned. When first questioned by law enforcement officers, however, she stated that appellant had not left the apartment.

At the hearing on the admissibility of this identification [of appellant as the purchaser of the automobile], three psychiatrists testified — one for the prosecution and two for the defense. Dr. Gott, the prosecution's expert who had also hypnotized Jensen, testified that the fact that Mr. Jensen had been shown the photograph would not affect his post-hypnosis identification because during the hypnosis session his mind was focused solely on the events surrounding the sale of the car. A later occurrence, such as the showing of this photograph, was not in his mind at the time of the sale of the car and thus would not affect his recall. The defense psychiatrists, Dr. Patterson and Dr. Wells, neither of whom had nearly as much experience with or confidence in hypnosis as Dr. Gott, did not agree with Dr. Gott and both indicated that the fact that Jensen had seen a previous picture of appellant might have influenced his choice after the hypnosis.

ARGUMENT

I

WHERE PETITIONER NEVER CLEARLY OBJECTED TO THE USE OF HYPNOSIS AS A TOOL TO HEIGHTEN RECOLLECTION OF WITNESSES, AND WHERE, FOR THAT REASON, THE INTERMEDIATE APPELLATE STATE COURT TO WHICH CERTIORARI IS SOUGHT, NEVER PASSED UPON THE ISSUE AND THE ISSUE WAS NOT CONSIDERED ON THE MERITS BY THE HIGHEST STATE COURT AND FURTHER, WHERE THE ISSUE INVOLVES A QUESTION OF STATE EVIDENTIARY LAW AND NO FEDERAL QUESTION, IT IS INAPPROPRIATE TO GRANT THE PETITION FOR WRIT OF CERTIORARI

Petitioner seeks to have this Honorable Court consider the propriety of hypnosis as a tool for law enforcement use for the purpose of identifying suspects. (Petn., pages 14-25, 29-39.) However, a threshold question, is whether this issue is properly before this Honorable Court.

Concerning petitioner's claim that the prosecution did not establish that hypnosis has been accepted by the scientific community as a reliable technique for enhancing or producing an identification of a suspect, respondent observes that petitioner never raised this claim at any time in the trial court. (RT Vol. A, B; Brief in Support of Motion to Exclude and Surpress Identification.)[5] On the contrary,

---

[5]Appellant's "Brief in Support of Motion to Exclude and Suppress Identification" is contained in the file of the Superior Court of the State of California, the trial court. By an order of the Court of Appeal of the State of California dated March 25, 1977, the Superior Court file was made a part of the record on appeal.

the defense in essence conceded in the trial court that hypnosis was a scientifically reliable technique for producing or enhancing identification. (RT Vol. B, 133; RT Vol. C, 26A.) It is, of course, well established under California law that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection at trial on the ground sought to be urged on appeal. (*People v. Welch* (1972) 8 Cal.3d 106, 114-115, 104 Cal.Rptr. 217, 222, 501 P.2d 225, 230; *People v. Mabry* (1969) 71 Cal.2d 430, 441, 78 Cal.Rptr. 655, 661, 455 P.2d 759, 765; *People v. DeSantiago* (1969) 71 Cal.2d 18, 22, 76 Cal.Rptr.809, 811, 453 P.2d 353, 355); *see People v. Boothe* (1977) 65 Cal.App. 3d 685, 690, 135 Cal.Rptr. 570, 573; *People v. Young* (1970) 9 Cal.App.3d 106, 109, 87 Cal.Rptr. 767, 768.) Consequently, since appellant did not in the trial court challenge the validity of hypnosis as a technique for producing or assisting an identification, he was precluded from urging the point on appeal. This is only proper since by not raising the objection at the trial level, appellant has precluded the prosecution from presenting evidence to the trial court as to the reliability of hypnosis in aiding in the production or enhancement of an identification.[6]

Generally, a litigant must follow state procedures in raising federal questions. Thus, when state practice re-

---

[6]Testimony of a witness concerning a matter as to which his memory has been enhanced by hypnosis has been held admissible in various jurisdictions. (*Kline v. Ford Motor Co. Inc.* (9th Cir. 1975) 523 F.2d 1067, 1069-1070; *Wyller v. Fairchild Hiller Corporation* (9th Cir. 1974) 503 F.2d 506, 509-510; *State v. Jorgensen* (Ore. App. 1971) 492 P.2d 312, 315; *Harding v. State* (Md. App. 1968) 246 A.2d 302, 306-312, *cert. denied* (1969) 395 U.S. 949; *see People v. Modesto* (1963) 59 Cal.2d 722, 732-733, 31 Cal.Rptr. 225, 231-232, 382 P.2d 33, 39-40 (overruled on another ground in *People v. Morse* (1964) 60 Cal.2d 631, 637 fn.2, 648, 649, 36 Cal.Rptr. 201, 204 fn.2, 212, 388 P.2d 33, 36 fn.2, 44.)

quires, the federal question must be raised before the trial court. (*See* Stern and Gressman, *Supreme Court Practice,* § 3.27 at page 120 (4th ed. 1969).) As noted above, California has such a rule.

In *Stembridge v. Georgia* (1952) 343 U.S. 541, 546-548, this Honorable Court held itself without jurisdiction to consider the case on the merits because the federal constitutional issue had not been raised in the trial court as required by state law, but was raised for the first time in a petition for rehearing addressed to the state intermediate court and the highest state court refused without opinion, to hear the case. This of course is similiar to the situation that occurred in the instant case. (*See* Opinion of the Court of Appeal, Appendix A to Petition, at pages 6-7.)

To grant the petition as to this issue would serve to discourage the full and fair consideration of such issues in state courts where such issues should receive initial consideration. Petitioners should not be encouraged to present issues where they can be properly considered and resolved.

Clearly, under these circumstances, the Petition for Writ of Certiorari should be denied for lack of jurisdiction as to the propriety of the identification made by the witness after hypnosis. (*Fuller v. Oregon* (1974) 417 U.S. 40, 50 fn.11; *Street v. New York* (1969) 394 U.S. 576, 582; *Stembridge v. Georgia supra,* at 546-547; *see also Hill v. California* (1971) 401 U.S. 797, 805; *Cardinale v. Louisiana* (1969) 394 U.S. 437; *Beck v. Washington* (1962) 369 U.S. 541, 550-553.)

Additionally, it is noted that petitions for certiorari should be granted only when substantial federal questions are at issue. (28 U.S.C. § 1257(3).) Here the issue involves only state law regarding the admissibility of evidence in state court and no federal question is presented.

Thus the petition for certiorari should not be granted. (*Cf. Labine v. Vincent* (1971) 401 U.S. 532, 539-540; *California v. Green* (1970) 399 U.S. 149, 171-172 (Burger, C.J. concurring).)

II

PETITIONER RECIEVED EFFECTIVE REPRESENTATION OF COUNSEL FROM HIS TRIAL DEFENSE COUNSEL AT TRIAL DESPITE THE FACT THAT TRIAL DEFENSE COUNSEL DID NOT OBJECT TO THE IDENTIFICATION EVIDENCE ON THE GROUND THAT THE IDENTIFICATION WAS MADE AFTER THE WITNESS HAD SEEN A PSYCHIATRIST WHO HAD SOUGHT TO ASSIST HIS RECALL THROUGH HYPNOSIS

Petitioner contends that he received inadequate representation from his trial defense counsel. (Petn., pages 25-28.)

California standards for adequacy of counsel are as set out in *People v. Cook* (1975) 13 Cal.3d 663, 672-673, 119 Cal.Rptr. 500, 506, 532 P.2d 148, 154:

> "Before a judgment may be reversed by reason of inadequacy of trial counsel it must appeal from the record 'that counsel's lack of diligence or competence reduced the trial to a "farce or a sham," ' within the meaning of People v. Ibarra, supra, 60 Cal.2d 460, 464-466 [citations omitted] or that he did not effectively supply to a defendant those skills and legal knowledge which we can reasonably expect from any member of the bar. . . ."

As noted in the opinion of the Court of Appeal, Appendix

A to Petition at page 7, under California law the burden is on the defendant to establish his counsel's ineffectiveness and proof of the ineffectiveness must be a demonstrable reality and not a matter of speculation. (*People v. Martinez* (1975) 14 Cal.3d 533, 538, 121 Cal.Rptr. 611, 614, 535 P.2d 739, 742.)

Within the federal system a conviction will not be disturbed unless a defendant's representation has been shown inadequate as to make his trial a farce, a sham or mockery of justice. (*United States v. Stern* (9th Cir. 1975) 519 F.2d 521, 524.) The accused has the burden of demonstrating that counsel failed to render reasonably effective assistance and that the result was a denial of fundamental fairness. (*United States v. Elksnis* (9th Cir. 1975) 528 F.2d 236, 238; *see generally Brubaker v. Dickson* (9th Cir. 1962) 310 F.2d 30, 37; *see Mc Mann v. Richardson* (1970) 397 U.S. 759, 771 (advice of counsel as to guilty plea must be "within the range of competence demanded of attorneys in criminal cases"); *Moore v. United States* (3d Cir. 1970) 432 F.2d 730, 736, 737 ("[T]he standard of adequacy of legal services as in other professions is the exercise of the customary skill and knowledge which normally prevails at the time and place.")

In *Beasley v. United States* (6th Cir. 1974) 491 F.2d 687, 696, it was stated that defense counsel "must perform at least as well as a lawyer with ordinary training and skill in the criminal law and must conscientiously protect his client's interest." Respondent submits that the word "perform" was not used without purpose.

In the instant case, trial defense counsel was able to secure two mistrials based on deadlocked juries. (Petn., pages 4-5.) Trial defense counsel ably and conscientiously represented petitioner throughout the trial, and petitioner certainly received a fair trial. As noted in the opinion of the

Court of Appeal of the State of California (Appenidx A to Petition, page 7), the psychiatric testimony, including testimony of two defense psychiatrists, relating to hypnosis, agreed that hypnosis was a proper technique for improving recollection. (Motion to surpress pretrial identification: RT Vol. A, 6 [prosecution psychiatrist], 74, 109, 120 [defense psychiatrists]. At trial: RT 320-322 [prosecution psychiatrist], 1195-1196, 1303 [defense psychiatrists].) One of the defense psychiatrists admitted that hypnosis in some instances was used as one of the tools available to psychiatrists in an attempt to improve memory recall. (RT 1303.) The other defense psychiatrist conceded that hypnosis can be used to improve someone's rememberance of a particular event. (RT 1195, 1196.) Since both defense psychiatrists admitted that hypnosis was used in the psychiatric community to improve memory recall, the trial defense counsel certainly cannot be faulted for not raising the objection at trial that hypnosis could not properly be so used.

The determination of the Court of Appeal of the State of California that trial defense counsel rendered constitutionally effective representation to petitioner finds strong factual support in the record. Petitioner has presented nothing more than speculation and conjecture and has not shown ineffective assistance of counsel as a demonstrable reality. The opinion of the Court of Appeal of the State of California affirming petitioner's conviction should not be disturbed. The petition for writ of certiorari should be denied.

CONCLUSION

For the foregoing reasons, it is requested that the petition for writ of certiorari be denied.

Respectfully submitted,

EVELLE J. YOUNGER, Attorney General
of the State of California
JACK R. WINKLER, Chief Assistant
Attorney General, Criminal Division
S. CLARK MOORE,
Assistant Attorney General
NORMAN H. SOKOLOW,
Deputy Attorney General
ANDREW D. AMERSON,
Deputy Attorney General
Attorneys for Respondent